Omni Innovations LLC et al v. Smartbargains.com LP et al Doc. 13

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OMNI INNOVATIONS, LLC, a Washington limited liability company; and JAMES S. GORDON JR. Plaintiffs, v. SMARTBARGAINS.COM, LP, a Delaware Limited Partnership; Defendant.	No. CV06-1129JCC **DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CAN-SPAM CLAIMS OR TO STAY THIS LITIGATION** NOTE ON MOTION CALENDAR: February 23, 2007

I. INTRODUCTION

Plaintiffs Omni Innovations, LLC ("Omni") and James S. Gordon Jr. ("Gordon") bring the instant lawsuit against Defendant SMARTBARGAINS.COM, LP ("SmartBargains") for violations of federal and state anti-spam statutes. SmartBargains hereby moves to dismiss Plaintiffs' first cause of action pursuant to Fed. R. Civ. P 12(b)(6) because Plaintiffs have not alleged sufficient facts to establish standing under the CAN-SPAM Act of 2003, 15 U.S.C. § 7701 et seq. ("CAN-SPAM"). In order to have standing, Plaintiffs must allege they are a "provider of Internet access service" who are "adversely affected" by email from SmartBargains violating the CAN-SPAM Act. They fail to make such allegations.

Furthermore, dispositive issues in this case are being adjudicated before this Court

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in *Gordon v. Virtumundo*, NO. CV06-0204JCC, W.Dist.Wa (Coughenour, J.) and in other courts in the Western and Eastern Districts of Washington. In particular, Gordon and defendants in other cases are litigating (i) whether Plaintiffs' novel theories are sufficient to establish a CAN-SPAM or Washington Commercial Electronic Mail Act (RCW 19.190) ("CEMA") violation; and (ii) whether Plaintiffs have standing as a "provider of Internet access service" that is "adversely affected" by email. If Plaintiffs' theories on either of those matters are rejected by the court, then those findings will have offensive issue preclusion/collateral estoppel effect on this case. Accordingly, SmartBargains moves to stay this lawsuit pending resolution of those other matters. Plaintiffs are not suffering irreparable harm – or any harm – as a result of the receipt emails from SmartBargains. Balancing the unnecessary waste of resources of this Court and expenditure of attorneys' fees against the modest (if any) actual damages to Plaintiffs, this Court should stay this lawsuit until such time as the Court enters a final judgment in *Gordon v. Virtumundo*.

II. FACTS

A. Plaintiffs' Allegations in the Complaint.

Plaintiffs seek damages for the receipt of unsolicited commercial email. It is a matter of public record that Plaintiffs are in the business of collecting emails in their "spam business."[1] Plaintiffs' "spam business" consists of finding hyper-technical violations of CAN-SPAM and CEMA and bringing suit against lawful businesses. In the present matter, Plaintiffs seek damages based upon the following theories:

> 13. Each of the E-mails misrepresents or obscures information in identifying the point of origin or the transmission path thereof, and contain header information that is materially false or materially misleading. The misrepresentations include without limitation: IP address and host name information do not match, or are missing or false, in the "from" and "by" tokens in the Received header field; and dates and times of transmission are deleted or obscured.
>
> 14. On information and belief, Plaintiffs allege that some of the E-mails used

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[1]See Deposition Transcript of James S. Gordon, attached to the Declaration of Derek A. Newman, *Gordon v. Virtumundo Inc et al*, Case No. 06-cv-00204-JCC, Dkt. No. 101 at 117:17-18.

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> the Internet domain name of a third party or third parties without permission of that third party or those third parties.

First Amended Complaint (FAC) at ¶ 13-14 (Dkt. #4).

B. Plaintiffs are not an Internet access service adversely affected.

Plaintiffs allege the following facts relevant to their standing under CAN-SPAM in their First Amended Complaint:

> 7. From at least August 2003 through May 2005, Plaintiff GORDON provided and enabled computer access for multiple users to a computer server that provides access to the Internet.
>
> 8. From and after May 2005, Plaintiff OMNI provided and enabled computer access for multiple users to a computer server that provides access to the Internet.

FAC (Dkt. #4) at p.2:5-9. Plaintiffs allege only that they allowed third parties to access the Internet through "**a**" computer server. Plaintiffs' alleged status as an Internet access service is based merely on the fact that Jim Gordon has an account he shares with at least two other people to access the Internet.

If Plaintiffs are an Internet access service, then almost all Internet users are Internet access services. Any college student who allows two friends into his/her dorm room to read a website has "enabled computer access for multiple users to a computer server that provides access to the Internet." Any individual who permits two strangers to check a "Yahoo!" webmail at a coffee shop has "enabled computer access for multiple users to a computer server that provides access to the Internet." Any individual who shares an Internet user name and password with two people has "enabled computer access for multiple users to a computer server that provides access to the Internet."

In fact, Plaintiffs do not even allege that, as a result of the services provided by Plaintiffs, that their customers *actually accessed* the Internet. Plaintiffs merely allege that they "enabled" computer access.

Furthermore, Plaintiffs do not allege that they are an Internet access service *adversely affected* by a statutory violation. The FAC merely alleges that Plaintiffs received emails messages from SmartBargains that allegedly violate CAN-SPAM and

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CEMA. (*See* FAC at ¶ 12.) However, Plaintiffs allege no adverse effect as a result of the receipt of emails from SmartBargains. For example, Plaintiffs do not allege that they were unable to use their computer in the course of their employment as a result of emails from SmartBargains. Rather, Plaintiffs merely allege that they received emails from SmartBargains that they could have deleted in a fraction of a second without any impact on their bandwidth, storage or computer usage.

C. Plaintiffs' status as an Internet access service and Plaintiffs novel theories regarding email header protocol are currently before this Court in *Gordon v. Virtumundo*.

In the matter of Gordon et al. v. Virtumundo et al., NO. CV06-0204JCC, W.Dist.Wa (Coughenour, J.), Plaintiffs Gordon and Omni have brought claims for damages against defendants represented by the same counsel as SmartBargains. In that case, the Virtumundo defendants moved for summary judgment alleging, amongst other things, that Plaintiffs (i) do not have standing because they are not, and never were, an Internet access service adversely effected; and (ii) that Plaintiffs' novel theories regarding email header protocol cannot give rise to a violation under CAN-SPAM or CEMA.

The Virtumundo defendants assert that Plaintiffs are not an Internet access service because the minimal act of assigning user names and passwords to provide free email accounts for their family members and others does not render them within the statutory definition of "Internet access service." An additional basis for the Virtumundo defendants' motion for summary judgment is that Plaintiffs have not experienced any adverse affect from a violation of CAN-SPAM.

Plaintiffs testified that they are in the "spam business" because Plaintiff Gordon is working on a doctoral thesis related to spam and because he collects spam to generate lawsuits. Plaintiffs only income since 2004 comes from settlements brought under anti-spam statutes. If Plaintiffs were damaged at all, which they were not, as a result of receiving unsolicited commercial email, then those damages have been remedied and Plaintiffs have been made whole as a result of other settlements received in anti-spam litigation.

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The Virtumundo defendants also challenged Plaintiffs' novel theories of email header protocol in *Gordon v. Virtumundo*. Plaintiffs allege violations of CAN-SPAM and CEMA in emails sent by the Virtumundo defendants because they have an improper IP address and host name protocol, transfer token information and other email header information. The basis of Plaintiffs' claims are technical in nature and involve the intricacies and inner-workings of email transmission over the Internet. Plaintiffs theories have no supporting case law, FTC rule or regulation, or express statutory language.

The Court's ruling on each of the foregoing issues of law as applied to Plaintiffs will have a dramatic impact on the outcome of this lawsuit.

D. Plaintiffs are not suffering imminent or irreparable harm as a result of the alleged violations.

Plaintiffs do not allege that SmartBargains engaged in any fraudulent act, that any individual was deceived, or that SmartBargains was not readily identifiable from the face of their emails, or through the WHOIS database. Plaintiffs do not allege that they are the victims of identity theft or that they have sent money to a Nigerian dictator in the hopes of receiving greater lottery winnings in return. Plaintiffs merely allege that SmartBargains sent them emails with header information that does not conform to their interpretation of a proper email header.

Plaintiffs do not suffer any actual damages as a result the receipt of commercial email. In fact, Plaintiffs benefit from commercial emails in support of their "spam business."

III. LAW AND ARGUMENT

A complaint should be dismissed for failure to state a claim upon which relief may be granted under FED. R. CIV. P. 12(b)(6) if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). When the legal sufficiency of a complaint's allegations are tested with a motion under Rule 12(b)(6), "[r]eview is limited to the complaint." Cervantes v. City of San Diego, 5 F.3d 1273, 1274 (9th Cir. 1993). All

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factual allegations set forth in the complaint are taken as true and construed in the light most favorable to the plaintiff. Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996). However, "[w]hile a court must accept all material allegations in the complaint as true and construe them in the light most favorable to the nonmoving party, conclusory allegations of law or unwarranted inferences of fact urged by the nonmoving party are insufficient to defeat a motion to dismiss." Segal Co. v. Amazon, 280 F. Supp. 2d 1229, 1232 (W. D. Wash. 2003) (Coughenour, J.).

A. Plaintiffs do not allege sufficient facts to have standing as an Internet access service.

In enacting the CAN-SPAM act,15 U.S.C.§ 7701 et seq., Congress expressly recognized that commercial email offers "unique opportunities for the development and growth of frictionless commerce." 15 U.S.C. § 7701(a)(1). Congress enacted a system to:

> 1) create a nationwide standard for commercial email;
>
> 2) prohibit senders of commercial electronic mail from misleading recipients as to the source or content of such mail; and
>
> 3) ensure that recipients of commercial electronic mail have the right to decline additional email from a particular source.

15 U.S.C. § 7701(b). The Act does not create any private cause of action for individual recipients of unsolicited commercial email, even if those emails violate the requirements of the Act. Rather, the Act is enforceable only by the Federal Trade Commission and other specified federal agencies, by state Attorneys General; and by "provider(s) of Internet access service" who are "adversely affected by a violation of section 7704 (a)(1), (b), or (d) of [the Act], or a pattern or practice that violates paragraph (2), (3), (4), or (5) of section 7704 (a)." 15 U.S.C. § 7706(g)(1) (emphasis added).

CAN-SPAM defers to section 231(e)(4) of title 47 for the definition of "Internet access service":

> The term "Internet access service" means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and

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> other services as part of a package of services offered to consumers. Such term does not include telecommunications services.

This language is ambiguous. If interpreted broadly, as Plaintiffs do, anyone can qualify as an "Internet access service". For example, a person allowing family members use of a computer in the home connected to the Internet "enables users to access content, information, electronic mail . . . over the Internet." Likewise, a person who inserts a hyperlink on a blog post or in an email falls within the purview of a broad construction of the definition. Banks, since ATM machines enable users to access balances via an Internet connection, would be Internet access services with standing to sue for CAN-SPAM violations. This broad interpretation of "Internet access service" would encompass vast numbers of persons Congress did not intend to have standing. Such a standard would effectively create an unlimited private cause of action for CAN-SPAM violations.

A narrow interpretation, in contrast, would exclude all but those who provide access to the Internet (e.g., dial-up, DSL, cable modem, or T1 service providers) and network based email services (such as Earthlink, Yahoo, MSN, and AOL). This interpretation has the advantage of meaningfully limiting standing under the Act.

In this case, Plaintiffs merely allege merely that they "enabled computer access for multiple users to a computer server that provides access to the Internet." Plaintiffs contend that their minimal act of enabling third parties to access a computer to access the Internet does not fall within the statutory definition of "Internet access service" that appears in CAN-SPAM. In light of the effective elimination of a standing limitation under CAN-SPAM, such an interpretation seems wildly overbroad and wholly unfounded.

Even assuming *arguendo* that enabling access to the Internet (whether or not such access was actually obtained) is an "Internet access service" within the meaning of the act, then, Plaintiffs' claim to standing is fatally undermined by the fact that Plaintiffs do not "provide" the services upon which they base their claim to standing. Plaintiffs' involvement with those accounts is limited to enabling access to the Internet by "a

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computer server", as opposed to Plaintiffs' computer server. The provider of the computer server, rather than Plaintiffs themselves, would (if utilized) provide Plaintiffs' third parties the ability to access the Internet. Plaintiffs allege nothing more.

Based on the facts alleged in the FAC, Plaintiffs are not providers of Internet access service and the FAC should be dismissed pursuant to FED. R. CIV. P. 12(b)(6) for failure to allege sufficient facts to establish standing under CAN-SPAM.

B. Plaintiffs Do not Allege that they are an Internet access service adversely affected by a violation of CAN-SPAM.

A provider of Internet access service does not have standing to sue under CAN-SPAM unless it is "adversely affected by a violation of" CAN-SPAM. 15 U.S.C. § 7706(g)(1). Plaintiffs no not allege that they have experienced any adverse affect from a violation of the statute. Plaintiffs do not allege that they have had to expand their network, or that they have had to add technical personnel to accommodate the unsolicited email they receive. Plaintiffs merely allege that they received the emails from a computer server via the Internet. This allegation is not sufficient to give rise to a claim that they were adversely affected and are entitled to a windfall of $4,956,600.00 plus treble damages and attorneys fees because they received 4506 emails with immaterial violations. (*See* FAC p. 2 ¶ 11, p. 4, ¶ 1)

C. This Lawsuit Should be Stayed Because Dispositive Issues are currently being adjudicated before this Court by the same Plaintiffs..

In the interests of judicial economy, the Court may exercise its inherent power to stay proceedings until the resolution of a related matter that would resolve a dispositive matter. *See* Leyva v. Certified Grocers of California, 593 F.2d 857, 863-64 (9th Cir. 1979) ("A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case."); *see also* Silvaco Data Systems, Inc. v. Technology Modeling Associates, Inc., 896 F. Supp. 973, 975 (N.D. Cal. 1995) ("in the interest of wise judicial administration, a federal court may stay its proceedings where a

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parallel state action is pending") (internal citation omitted).

"Collateral estoppel" or "issue preclusion" generally prevents a party from relitigating an issue that the party has litigated and lost. *See* Catholic Social Servs., Inc. v. I.N.S., 232 F.3d 1139, 1152 (9th Cir. 2000). The application of "offensive nonmutual issue preclusion" is appropriate only if:

1. there was a full and fair opportunity to litigate the identical issue in the prior action, *see* Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1399 (9th Cir. 1992); Resolution Trust Corp. v. Keating, 186 F.3d 1110, 1114 (9th Cir. 1999); Appling v. State Farm Mut. Auto Ins. Co., 340 F.3d 769, 775 (9th Cir. 2003);
2. the issue was actually litigated in the prior action, *see* Appling, 340 F.3d at 775;
3. the issue was decided in a final judgment, *see* Resolution Trust Corp., 186 F.3d at 1114; and
4. the party against whom issue preclusion is asserted was a party or in privity with a party to the prior action, *see* id.

See also Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 (9th Cir. 2006); Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir. 1988). If the Court finds that Gordon and Omni do not have standing as an Internet access service in *Gordon et. al v. Virtumundo et al.*, then issue preclusion will be dispositive as to Plaintiffs' federal CAN-SPAM claims in the instant lawsuit. Alternatively, if the Court rejects Plaintiffs' theories regarding email protocol and whether immaterial violations can entitle a Plaintiff to recover statutory damages, then those findings will apply to Plaintiffs' theories in the instant matter.

First, Plaintiffs are the same entities as the plaintiffs in *Gordon et. al v. Virtumundo et al.* who, by definition, had a full and fair opportunity to litigate the identical issue in the prior action. Defendants' motion for summary judgment in the Virtumundo case is noted for February 16, 2007 and trial is scheduled for April, 2007. Plaintiffs will have an opportunity to oppose the motion for summary judgment and, if applicable, advance any facts or testimony at trial that supports their claim that they are an

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Internet access service.

Second, the matters of (i) whether Plaintiffs have standing as an Internet access service that is adversely effected; and (ii) whether Plaintiffs' novel theories give rise to a claim for statutory damages under CAN-SPAM or CEMA are before the Court in the Virtumundo case.

Third, after the Court resolves the motion in the *Gordon v. Virtumundo*, then it will be a final judgment. Because the matter is not yet resolved with finality, SmartBargains merely seeks a stay and not summary judgment. However, it is reasonably likely that the Court will have ruled on the matter prior to the instant motion being fully briefed and that summary judgment is appropriate.

Finally, Plaintiffs are the identical Plaintiffs as in *Gordon v. Virtumundo* and, accordingly, the forth prong of issue preclusion has been satisfied.

In the interest of judicial economy and avoiding the potential waste of hundreds of hours of attorney time and unnecessary pretrial motion practice before the Court, this Court should stay this lawsuit. In the event that the Court does not grant a stay, then the parties will have no alternative but to commence discovery. SmartBargains will request substantially the same documents and issue the same requests for admission as propounded by SmartBargains' counsel in the Virtumundo lawsuit. Plaintiffs will likely provide the same answers and the same documents. In turn, the parties will take depositions and develop much of the same record as the related action. These efforts will take many months and consume many thousands of dollars. However, all of that time and money could be for not if the Court were to rule either that (i) Plaintiffs are not an Internet access service adversely affected by emails or (ii) that Plaintiffs' novel theories of email protocol do not give rise to statutory violation or cause of action. Such rulings would preclude Plaintiffs from prevailing on their CAN-SPAM or CEMA claims in the instant lawsuit pursuant to the doctrine of offensive nonmutual issue preclusion.

This case is in its nascent stages and the parties have not yet devoted resources to conduct discovery and pretrial motion practice. Balancing the actual damages to

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Plaintiffs against the unnecessary expenditure of resources, this Court should grant a stay until such time as it makes a final adjudication of whether Plaintiffs have standing and whether Plaintiffs email header protocol theories prevail.

IV. CONCLUSION

Pursuant to Fed. R. Civ. P 12(b)(6), Plaintiffs do not have standing to bring their claims under CAN-SPAM as a matter of law because they do not allege sufficient facts to qualify as an Internet access service adversely affected by Defendant's commercial email. Assuming *arguendo*, that the Court does conclude, as a matter of law, that it is sufficient to bring claims under CAN-SPAM merely because Plaintiffs allege that they "enabled computer access for multiple users to a computer server that provides access to the Internet", then the Court should stay this litigation pending a final judgment in *Gordon v. Virtumundo*. This Court will resolve many of the same issues in that case as in this case – including the threshold issue of whether Plaintiffs have standing – and it would be a gross waste of judicial resources and the resources of the parties to litigate a matter that may be resolved outside of this litigation.

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DATED this 26th day of January, 2007.

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